UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 46 | Number 2 Article 7

2-1-1968

Constitutional Law -- Effect of the Right to Speedy Trial on Nolle Prosequi

William S. Geimer

allow the court to continue the appointment if it determined counsel was required.[50]

STEPHEN E. CULBRETH

Constitutional Law—Effect of the Right to Speedy Trial on Nolle Prosequi

In *Klopfer v. North Carolina*,[1] the United States Supreme Court held that the sixth amendment guarantee of the right to speedy trial is a basic right protected by the Constitution and is therefore incorporated into the due process clause and made obligatory upon the states under the fourteenth amendment.[2] Implicit in the decision is the proposition that the speedy trial guarantee is to be enforced against the states according to the federal standard.[3]

In *Klopfer*, a violation of the sixth amendment was found in the use of the North Carolina procedural device of "nolle prosequi with leave." Its objectionable characteristic is the power given the state solicitor to suspend indefinitely action on a case, after an indictment has been filed, and notwithstanding defendant's timely demand for trial.

Klopfer, a Duke University professor, was tried in March, 1964 on charges of criminal trespass resulting from his participation in a widespread effort to desegregate stores and eating places in Chapel Hill in January of that year.[4] A mistrial was declared when the jury could not agree and the case was continued. Prior to the next

[50] *Id.* It is hoped that this would reduce the number of claims for relief and all but eliminate the frivolous ones. Counsel should advise the prisoner of the risks inherent in filing the petition: it endangers eligibility for parole and if successful the relief is usually limited to a new trial and the danger of a higher sentence.

[1] 87 S. Ct. 988 (1967).

[2] *E.g.*, Pointer v. Texas, 380 U.S. 400 (1965) (sixth amendment right to confrontation); Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment privilege against self incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel). These decisions, like the instant case, are part of a continuing pattern which is apparently directed towards complete imposition of at least the guarantees of the first eight amendments upon the states by declaring them to be a part of the fourteenth amendment. For a discussion of how, if at all, this operation should come about, *see* Palko v. Connecticut, 302 U.S. 319 (1937).

[3] "To be enforced against the states under the Fourteenth Amendment according to the same standards that protect these personal rights against federal encroachment." Malloy v. Hogan, 378 U.S. 1, 10 (1964).

[4] *See* Pollitt, *Legal Problems in Southern Desegregation: The Chapel Hill Story*, 43 N.C.L. REV. 689 (1965).

session of criminal court, Klopfer was informed by the solicitor that a *nolle prosequi* would be requested. Klopfer objected on the basis that the 1964 Civil Rights Act, as construed by the United States Supreme Court,[5] had abated the trespass prosecution. The solicitor thereupon moved for, and was granted, a further continuance. The matter came to a head on August 9, 1965, when the case was considered in response to a motion filed by Klopfer when he discovered that his case was not docketed for the August term. At the hearing on that motion, the solicitor was granted a *nol. pros.* with leave. The North Carolina Supreme Court affirmed,[6] and further appeal to the United States Supreme Court resulted in unanimous reversal.

The holding in *Klopfer* renders the federal speedy trial standard binding on the states but fails to explain just what that standard is. The Federal Rules of Criminal Procedure contain a general authorization for the courts to dismiss an indictment if there is unnecessary delay in bringing the case to trial.[7] The facts and circumstances of each case are to be considered in determining whether there has been an unconstitutional deprivation of the right to speedy trial.[8] These facts are to be viewed in light of three purposes of the guarantee: (1) to prevent undue incarceration prior to trial; (2) to minimize anxiety and concern attendant upon public accusation; and (3) to limit the possibility that delay will impair the ability of the accused to defend himself.[9]

Decisions of the lower federal courts help to clarify the basic speedy trial guidelines. Consideration must be given to the potential as well as the actual prejudice which may result from long delays.[10] Lower federal courts cite with approval many state decisions to the effect that prejudice in fact is not required to be shown by the defendant.[11] Additionally, the federal decisions appear to place the basic burden of justification for delay upon the govern-

[5] In Hamm v. City of Rock Hill, 379 U.S. 306 (1964) the Supreme Court held that pending trespass prosecutions for acts which were declared legal by the Civil Rights Act of 1964 were abated by the act, even though the trespass occurred prior to its passage.

[6] State v. Klopfer, 266 N.C. 349, 145 S.E.2d 909 (1966).

[7] FED. R. CRIM. P. 48(b).

[8] Pollard v. United States, 352 U.S. 354, 361 (1957).

[9] United States v. Ewell, 383 U.S. 116, 120 (1966).

[10] United States v. McWilliams, 163 F.2d 695, 696 (D.C. Cir. 1947).

[11] United States v. Provoo, 17 F.R.D. 183, 198 (D. Md. 1955), *aff'd.*, 350 U.S. 857 (1955).

ment, rather than the accused. In *Hedgepeth v. United States*[12] there is a statement that, whereas time is only one factor to consider, it is nevertheless the most important factor, and the longer the delay the heavier the burden on the government in arguing that the right has not been abridged.[13] Other factors to be given weight are the diligence of the prosecution, the defense, and the court.[14] Finally, federal authorities agree that the speedy trial guarantee may be waived, and that a presumption of waiver or acquiescence arises when no demand for trial is made.[15]

In spite of the broadness of the federal speedy trial standard, it appears that compliance with the fourteenth amendment requirement of "fundamental fairness"[16] calls for a close re-examination of the old and respected device of *nol. pros.* in North Carolina.[17] In both *nol. pros.* and *nol. pros.* with leave, the permission of the court is theoretically required before a case may be restored to the trial docket, and in both actions the defendant loses no freedom of movement.[18] In *nol. pros.* with leave, however, the general permission of the court to reinstate the indictment is given at the time *nol. pros.* with leave is granted. This leaves the date of the trial, if there is to be one, completely in the control of the solicitor. In view of the Supreme Court's holding in *Klopfer* that the right to speedy trial affords affirmative protection against *unjustified* delay, it is difficult to see how the procedure of *nol. pros.* with leave can be further tolerated. The solicitor cannot justify in advance a delay of undetermined length. In the case of simple *nol. pros.*, the court must grant permission at the time of reinstatement. In this context, keeping in mind the federal standard requirement of the present decision, the question arises as to whether or not the North

[12] 364 F.2d 684 (D.C. Cir. 1966).
[13] *Id.* at 687.
[14] *Id.*
[15] United States v. Provoo, 17 F.R.D. 183, 198 (D.Md. 1955). *See also* Annot., 57 A.L.R.2d 302, 306 (1958).
[16] Gideon v. Wainwright, 372 U.S. 335, 342 (1963).
[17] *Nolle prosequi* is not authorized by statute, but has evidently been carried over from English common law, where its use can be traced back to the time of Charles II. Goddard v. Smith, 87 Eng. Rep. 1008, 1009 (Q.B. 1705). For a detailed explanation of the employment of *nolle prosequi* in North Carolina and a warning that the state decision in Klopfer could be an abuse, see Note, 44 N.C.L. REV. 1126 (1966).
[18] The state does not restrict travel, but one who is under indictment may be denied a passport by the Secretary of State, and thus forbidden to leave the country. See Kent v. Dulles, 357 U.S. 116 (1958).

Carolina courts would refuse permission to reinstate, based solely on a failure by the solicitor to justify the delay. To date, except for *Klopfer*, it appears that no speedy trial standard, federal or state, has seriously impaired the solicitor's use of *nol. pros.* and *nol. pros.* with leave.

The North Carolina Supreme Court is quite clear about appointing inferior courts at all levels as watchdogs to guard against abuses of *nol. pros.*;[19] but apparently it has not departed from the criterion that "the discharge of the prisoner without delay is the true test of the termination of the action so that it matters not whether it is terminated by nol pros. . . and nol pros with leave."[20] The following sentiments appear to be more in keeping with the *Klopfer* decision: "The belief that all judges will take care to see that no unfairness is allowed to take place disregards the fact that the loss of the right to speedy trial is in itself unfair."[21]

Prior to the present decision, the speedy trial standard in North Carolina appears to have involved judicial consideration of four factors: (1) length of the delay, (2) reason for the delay, (3) resultant prejudice to the defendant, and (4) any waiver of the guarantee by the defendant.[22] In addition, it is strongly indicated that the guarantee does not apply to persons released on bail,[23] and that the burden rests upon the person asserting denial of a speedy trial to show that the delay was due to willfulness or neglect on the part of the state.[24] A demand for trial is apparently also a requisite in order to avoid waiver of the guarantee.[25]

A comparison with the federal speedy trial standard outlined above shows that too much weight is being given in North Carolina to the freedom of the defendant as a balm to soothe the ills of delay. Likewise, the state appears not to be in line with the federal standard as to where the basic burden lies when the issue of speedy trial arises. The federal proposition that the delay must not be purposeful or oppressive[26] is not to be narrowly construed; the delay does not have to be deliberate to violate the sixth amendment and its

[19] State v. Smith, 129 N.C. 546, 40 S.E. 1 (1901); State v. Thornton, 35 N.C. 256, 258 (1852); State v. Thompson, 10 N.C. 614 (1825).
[20] Wilkinson v. Wilkinson, 159 N.C. 265, 267, 74 S.E. 740, 741 (1912).
[21] Note, 13 OKLA. L. REV. 325, 329 (1960).
[22] State v. Lowry, 263 N.C. 536, 542, 139 S.E.2d 870, 875 (1965).
[23] *Id.* at 543, 139 S.E.2d at 876.
[24] State v. Hollars, 266 N.C. 45, 52, 145 S.E.2d 309, 314 (1965).
[25] *Id.* at 53, 145 S.E.2d at 315.
[26] Pollard v. United States, 352 U.S. 354, 361 (1957).

very length may place a heavy burden of justification upon the prosecution.

Otherwise, so long as the anxiety attendant to public accusation is given proper weight, the factors considered by the North Carolina courts appear adequate for the determination of whether the speedy trial guarantee has been abridged, according to the federal standard. The requirements of the fourteenth amendment, then, would apparently be met if judges put teeth into the device of *nol. pros.* by seriously evaluating, in light of the federal standard, each request by a solicitor to reinstate an indictment. There appears to be no way of squaring *nol. pros.* with leave with the fourteenth amendment and the use of this device should be abandoned.

It can be fairly concluded that *Klopfer* requires only a new attitude in employment of simple *nol. pros.* But difficulties may be avoided, and time and money saved if some method of safeguarding the right to speedy trial is employed other than dismissal of indictments by the courts upon determination that the federal standard has not been met. The precise requirements of the guarantee are sure to remain subject to interpretation, and therefore to litigation. It would serve the ends of efficiency as well as justice if the state were to go beyond the bare minimum requirement as it stands today and enact a statute which places a definite and reasonable limitation upon the state whereby an accused person must either be brought to trial or the indictment dismissed.

Many states have such statutes. The details vary but the most common limitations provide for dismissal if the defendant is not brought to trial within sixty days after the filing of the indictment or information,[27] or within the present or next succeeding term of court,[28] or a combination of the two.[29] All of the statutes provide that they are not operative if the delay is at defendant's request and many are not absolute in that they operate only in the event good cause it not shown for delay past the statutory period.[30] It is suggested that North Carolina draft a statute which provides that:

[27] ARIZ. RULES CRIM. PROC. 236 (1956); CAL. PEN. CODE § 1382 (1954); NEV. REV. STAT. § 178.495 (1957); WASH. REV. CODE § 10.46.010 (1961).

[28] GA. CODE ANN. § 27-1901 (1953); IDAHO CODE tit. 19, § 3501 (1948); ME. REV. STAT. ANN. tit. 15, § 1201 (1964); N.D. REV. CODE § 29-1801 (1943); OKLA. STAT. tit. 22, § 812 (1951); UTAH CODE ANN. § 77-51-1 (1953).

[29] IOWA CODE § 795.2 (1962).

[30] The statutes of Arizona, California, Idaho, Nevada and Oklahoma contain this provision.

(1) defendant must be brought to trial within the same term of court in which the indictment is filed, or within the next succeeding term of a court competent to try him, and (2) unless good cause is shown by the state for failure to bring defendant to trial within this period, this statute shall operate as a bar to future prosecution for offenses arising out of facts alleged in the indictment. This proposed statute would not operate as a "sword for the defendant,"[31] for the General Assembly is able to draft initially, and subsequently revise as necessary, the time limitations to reflect the current ability of the state's courts, acting with reasonable diligence, to bring persons to trial. That period at any given time might be longer than two terms of court. At any rate, *Klopfer* makes clear that an outer limit of some type, however determined, is necessary.

So much for the law. In reality, Klopfer has not yet had his trial. He attempted to have the case removed to federal court under procedures recently outlined by the United States Supreme Court for cases arising out of civil rights disputes.[32] But the federal district court declined to take jurisdiction on November 17, 1967, stating that the state court should be given another chance to dismiss the indictment.

WILLIAM S. GEIMER

Constitutional Law—Defamation under the First Amendment—The Actual Malice Test and "Public Figures"

In *New York Times Co. v. Sullivan*[1] the United States Supreme Court held that "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"[2] was such that in certain cases libelous misstatements of fact were qualifiedly protected by the first and fourteenth amendments. In granting this constitutional protection to misstatements of fact,[3] the Court held that the protection was for critics of the

[31] State v. Lowry, 263 N.C. 536, 542, 139 S.E.2d 870, 875 (1965).
[32] Georgia v. Rachel, 384 U.S. 780 (1966); Greenwood v. Peacock, 384 U.S. 808 (1966).

[1] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
[2] *Id.* at 270.
[3] The Court expressly adopted the minority view. 376 U.S. at 280 & 281. *See, e.g.*, Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908); Ponder v. Cobb, 257 N.C. 281, 126 S.E.2d 67 (1962); Annot., 150 A.L.R. 358 (1944).